In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-676

BOWMAN TRANSPORTATION, INC.,
Appellant,

vs.

ARKANSAS-BEST FREIGHT SYSTEM, INC., et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF ARKANSAS,
FORT SMITH DIVISION

APPELLEES' MOTION TO AFFIRM

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Appellees[1] in the above-styled cause move to affirm this case on the ground that the questions presented are so unsubstantial as not to need further argument.

1. Arkansas-Best Freight System, Inc., ET&WNC Transportation Co., Gordons Transports, Inc., Mercury Motors, Inc., Red Line Transfer and Storage Company, Inc., T.I.M.E.-DC, Inc., Transcon Lines, Yellow Freight System, Inc. and Jack Cole-Dixie Highway Company.

QUESTION PRESENTED

Following remand to it by this Court, the District Court upheld the grant to a motor carrier of certain operating authority that exceeded the scope of the carrier's application to the ICC, holding that the grant of such excess authority was supported by evidence and by a Commission finding of public need therefor. However, as to certain other operating authority that exceeded the scope of the carrier's application, the District Court recognized and held that there was *no* evidence in the record to support the grant of such authority and that *no* finding of public need therefor had been made by the Commission. The question presented is:

> Did the District Court err in setting aside the grant of that portion of the operating authority that exceeded the scope of the carrier's application, for which there was no supporting evidence in the record and no Commission finding of public need?

STATEMENT OF THE CASE

This is the second time this case has been before this Court. Initially, the case involved a decision of the Interstate Commerce Commission granting additional operating authority to three motor common carriers (Bowman Transportation, Inc., Johnson Motor Lines, Inc., and Red Ball Motor Freight, Inc.). The three-judge District Court had found that there was no rational basis for the determinative findings and conclusions set forth in the Commission's order and held such order invalid.[2] On appeal, this Court

2. *Arkansas-Best Freight System, Inc.* v. *United States*, 350 F.Supp. 539, 364 F.Supp. 1239 (W.D. Ark. 1972, 1973).

reversed such judgment and upheld the grant by the Commission of all authority embraced within the scope of the three applications filed by the appellant carriers.[3] However, this Court did not uphold the Commission's grant to appellant Bowman of operating authority that exceeded the scope of that appellant's application to the Commission.

In its initial decision the District Court had expressed disapproval of the Commission's failure to sustain the claim of appellees (plaintiffs below) that the Commission improperly granted to appellant Bowman certain operating authority that exceeded the scope of the application that Bowman presented to the Commission. Recognizing that the District Court's consideration of the grant of excess authority to Bowman was not necessary to that court's decision to set aside the Commission's approval of all the applications, and that such issue was not briefed and argued on appeal, this Court remanded that aspect of the Bowman case for decision by the three-judge District Court.[4]

Pursuant to this Court's mandate, the District Court entered an order terminating its prior injunction, thereby authorizing the Commission to issue the certificates of public convenience and necessity to Red Ball and Johnson as approved by this Court. Further complying with this Court's mandate, the District Court also authorized the Commission to proceed with the issuance of a certificate to Bowman, authorizing Bowman to conduct all operations

3. *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc., et al.*, 419 U.S. 281 (Dec. 23, 1974; rehearing denied Feb. 24, 1975).

4. The last sentence of this Court's opinion referred to Bowman's "original application." While Bowman *reduced* the scope of its original application, by restrictive amendments submitted during the course of the agency hearing (J.S., App. A, p. 28), it never sought to *enlarge* such scope and it never requested or even suggested to the Commission that any excess authority be granted.

embraced within the scope of Bowman's application to the Commission. Pending judicial determination of the issue remanded to the District Court, that court directed the Commission to refrain from granting Bowman any operating authority that exceeded the scope of the Bowman application (J.S., App. A, pp. 26-27).

The Commission thereupon promptly issued the approved certificates to Red Ball and Johnson. However, the approved certificate was not issued to Bowman, in view of the pendency of a separate proceeding in which the Commission had charged Bowman with failure to fulfill its obligations to the public under previously granted certificates.[5]

Following the submission of briefs and oral arguments dealing with the issue on remand, the District Court rendered its decision as to the validity of the Commission's grant to Bowman of operating authority that exceeded the scope of Bowman's application to the Commission. As explained in the District Court's opinion, the Commission's order granted Bowman operating authority that exceeded the scope of the Bowman application as follows:

> "(1) The Commission granted excess authority to Bowman to serve points on the Montgomery route and to use Montgomery as a gateway, and (2) it failed to include in its restrictions a provision that would prevent Bowman from joining newly acquired authority

5. "The certificates in these proceedings are being held in abeyance pending the determination of Bowman's fitness in the instant proceeding." *Bowman Transportation, Inc.—Investigation and Revocation of Certificates*, No. MC-C-8412, Initial Decision, April 23, 1975. By order dated September 18, 1975, terminating that proceeding, the Commission admonished Bowman to fulfill its obligations under its certificates, but concluded that its past conduct would not be deemed a bar to the issuance of future certificates. Although the impediment of that proceeding has now been removed, the certificate approved in the present proceeding has not as yet been issued to Bowman.

> with the authority acquired by Bowman subsequent to the hearing herein by purchase from Alabama Highway Express." (J.S., App. A, p. 31).

The District Court concluded "that by giving to the Commission's finding every possible presumption of correctness and by interpreting the findings in the light most favorable to the Commission, it [the District Court] can uphold the Commission's grant described as in (1) above, but not that described as (2)." (J.S., App. A, p. 31).

No appeal has been taken from the District Court's approval of the excess authority granted Bowman as described in (1) above.

No appeal has been taken by the defendants, the United States of America and the Interstate Commerce Commission, from the District Court's finding that the Commission erred in granting to Bowman the excess authority described in (2) above.

The only appeal is by intervening defendant Bowman which challenges the authority of the District Court to hold invalid the Commission's grant of such excess authority to Bowman, even though such appellant does not challenge the court's finding that (a) no evidence appears in the record to support such grant and (b) there was no finding by the Commission of any public need for the grant of such authority.

Appellant Bowman repeatedly charges the lower Court with improperly *modifying* a certificate issued by the ICC and "judicially approved by the Supreme Court." (See, *e.g.*, J.S. p. 4). As noted, no certificate has actually been issued to Bowman; therefore, there has been no modification. In addition, in its prior opinion this Court held that "the issue of conformity of the Bowman certificate

to its application is one for the District Court," recognizing that such issue "was not briefed or argued here, owing to the limitation set forth in our order noting probable jurisdiction." Pursuant to this Court's mandate, the Commission has been free to issue to Bowman the only "judicially approved" certificate; that is, a certificate embracing all authority within the scope of Bowman's application. Since the entry of the District Court's order on remand, the Commission has been free also to issue to Bowman a certificate embracing the excess authority described in (1) above. At no stage of the proceeding has there been any judicial approval given to the Commission's grant to Bowman of the excess authority described in (2) above. The Commission's failure to date to issue a certificate to Bowman does not relate to any issue in this proceeding.

Appellees contend that, pursuant to this Court's mandate, the District Court properly discharged its statutory responsibilities in directing the ICC to refrain from granting to Bowman operating authority that Bowman did not seek, since no evidence was presented that such authority would meet the convenience or necessity of the public, and since no finding was made by the Commission that there was any public need for such service.

THE QUESTIONS ARE NOT SUBSTANTIAL

The District Court Accorded Every Presumption of Correctness to the Commission's Order.

The issue remanded to the District Court for consideration was quite limited. This Court approved the Commission's grant to Bowman, Red Ball and Johnson of *all* operating authority embraced within the scope of the applications as presented to the Commission. The only issue that remained was the propriety of the Commission's grant to Bowman of authority that Bowman did not seek either in its application to the Commission or in its pleadings and briefs subsequently filed with the Commission. This Court noted that "the District Court indicated disapproval of the Commission's action" in granting such excess authority to Bowman, but recognized that "the court did not have to rule on the merits of appellees' objections since it set aside the Commission's approval of all of the applications." This Court did not consider it appropriate to resolve that issue on the prior appeal since it "was not briefed or argued here, owing to the limitations set forth in our order noting probable jurisdiction." (J.S., App. A, p. 25).

In disposing of that issue on remand, the District Court *upheld* the grant to Bowman of all excess authority that was the subject of any findings in the Commission's order that could be construed to support such action by the Commission. In reaching that result, the court "endeavored to give to the Commission's order every possible presumption of correctness and to resolve every ambiguity in a way that would support the conclusions of the agency." (J.S., App. A, p. 28). In addition, it was also necessary for the court to interpret the Commission's findings "in the light most favorable to the Commission" (J.S., App. A, p. 31), since such findings were by no means clear or positive.[6]

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6. Bowman itself presented little or no evidence that could be construed to support a finding of need for the excess authority approved by the District Court. "This testimony was proffered primarily in support of some other carriers whose applications were heard on the consolidated record and was not specifically presented in support of any proposal by Bowman . . . However, in a proceeding of this type the Commission may properly consider all evidence of record regardless of which applicant was responsible for the presentation of such evidence." (J.S., App. A, pp. 30-31).

The extent of the District Court's decision on remand is succinctly stated in its conclusion:

> "We set aside as invalid only that portion of the Commission's order that granted Bowman excess authority that was and is not supported by any evidence of public need and in regard to which there was no finding of any public need." (J.S., App. A, p. 44).

In its brief and arguments on remand, Bowman did not cite to the court any evidence of record that could be construed as supporting a need for service between the points involved in such excess grant. The Commission, in its report, made no finding of public need for such service.

In its Jurisdictional Statement, Bowman does not challenge the correctness of the above-quoted finding of the District Court.

Appellant Does Not Take Issue With the Factual Basis of the District Court's Decision.

In 1965, when Bowman filed its application with the Commission, it held authority from the Commission to operate as a common carrier throughout an extensive area embracing essentially 13 states in the southeastern and eastern portions of the country. It sought authority to extend its operations westward from Alabama into Mississippi, Louisiana, Texas, Arkansas, Missouri and Kansas. However, its proposal was limited by certain key restrictions set forth in the application. These restrictions clearly stated that Bowman was not proposing to perform any local service between points on the proposed routes. Its proposal was limited entirely to the handling of long-haul traffic moving to or from a point then served by Bowman under its *existing* authority. In other words,

Bowman sought to join or tack[7] its "present authority" (shown in yellow, App. D, J.S., p. 57) with the new area sought to be served (shown in black, App. D, J.S., p. 57). As noted, this restriction severely limited the scope of Bowman's application, since without such restriction the proposal would have included the handling of traffic moving, for example, between Arkansas and Texas, between Kansas and Louisiana, between Missouri and Mississippi, and so on. No such service was proposed since Bowman sought only to handle traffic moving between points in its present territory, on the one hand, and, on the other, points in the new territory.

Specifically, the application stated this proposal as follows:

> "Applicant seeks authority and proposes to tack all authority granted herein to its present rights under Certificate MC-94201 and subs, an accurate copy of which is attached to the application." (Form BMC 78, filed July 12, 1965, Ex. A, p. 6).

In addition, Bowman also specified that it "does not seek authority to serve between any points west of its presently authorized points." 114 M.C.C. 571, 585.

In further explanation of its proposal, Bowman's application attached copies of its "present authority" and a map showing its "present authority" in the states of "Ala., Conn., Del., Fla., Ga., Md., N.J., N.Y., N.C., Pa., S.C., Tenn., Va. and Washington, D.C."

Pursuant to its rules, the ICC gave public notice of Bowman's application by publication in the Federal Reg-

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7. "Tacking" is the term normally utilized by the Commission to describe the joinder of routes and territories.

ister.[8] This publication described in detail the routes and territories sought to be served by Bowman and summarized the restrictive nature of the proposals. As to the proposed joinder of such routes, the notice stated:

> "Applicant also states that it intends to tack the above proposed routes with each other and with that authority previously granted under certificates No. MC-94201 and subs . . . ."

Although Bowman subsequently *reduced* the scope of its application by further restrictive amendments, *no request was ever made by Bowman for an enlargement of the application.*

The District Court's initial opinion commented on the terminology used in the Federal Register publication.[9] On remand the court repeated these comments and also considered, for the first time, the restrictive terminology of the application itself[10] (J.S., App. A, pp. 32-33, 36). The District Court properly determined that the Federal Register publication is, by statute and judicial authority, "notice to all interested parties." See 44 U.S.C. §1507; *Federal Crop Ins. Corp.* v. *Merrill,* 332 U.S. 380 (1947); *Buckner Trucking, Inc.* v. *United States,* 354 F.Supp. 1210 (S.D. Tex. 1973).

The District Court also found that the appellees and other interested parties were entitled to rely on the representations contained in the application. *Baggett Transportation Co.* v. *United States,* 206 F.Supp. 835 (N.D. Ala. 1962); *Eagle Motor Lines, Inc.* v. *United States,* 331 F.Supp. 80 (N.D. Ala. 1971) (J.S., App. A, p. 37).

8. "Notice of the filing of application to competitors and other interested persons will be given by the publication of a summary of the authority sought in the FEDERAL REGISTER. Such summary will be prepared by the Commission, and it shall be the responsibility of applicant promptly to advise the Commission if the summary does not properly describe the authority sought." 49 CFR ¶ 1100.247(c)(1).

9. 364 F.Supp. at 1255.

10. The District Court found that: "There is nothing ambiguous in the application or in the notice describing the proposal." (J.S., App. A, p. 36).

Subsequent to the close of the hearing before the Commission, Bowman filed a separate application seeking approval of the purchase by Bowman of additional operating authority from Alabama Highway Express (AHE). The AHE authority duplicated some of Bowman's existing authority in Tennessee and Florida, but embraced the states of Ohio, Indiana and Illinois, a completely new territory for Bowman.[11] Although Bowman consummated its purchase of the AHE authority while the present proceeding was awaiting final decision by the Commission, Bowman at no time modified its proposal by requesting or even suggesting that it be granted the right to join or tack the authority sought in this proceeding with that acquired from Alabama Highway Express. On the contrary, Bowman repeatedly and consistently described its proposal in terms of its application and the notice thereof published in the Federal Register, stating:

> "The purpose of the Bowman application is:
>
> > "To provide a reliable and expeditious single-line service between the eastern and southeastern points served by Bowman in the states of Florida, Georgia, Alabama, Tennessee, South Carolina, North Carolina, Virginia, Maryland, Pennsylvania, Delaware, New Jersey, New York, and Connecticut, and the Southwestern and Central points here involved."[12]

11. The new (AHE) territory is shown in green on Bowman's map (J.S., App. D, p. 57).

12. Note that Ohio, Indiana and Illinois (the AHE territory) are not included. This explanation appeared at the outset of

(Continued on following page)

In like manner, Bowman consistently represented to the Commission that, if granted the requested authority, "Bowman will coordinate its existing service throughout its *13 eastern and southeastern states* and the 47 new points proposed to provide a regular, dependable and consistent service between its present and proposed points." (Emphasis added). Bowman defined the "involved area" as "southeast-southwest."[13] At no point in any brief or pleading, until *after* the Commission's decision, did Bowman represent its proposal as including a proposed joinder of the requested authority with the AHE authority.

There were, of course, several reasons why Bowman did not seek to enlarge the application beyond its original scope. These included the following:

1. The record in this proceeding was closed before Bowman started the AHE acquisition, and there was no evidence in the record of any need for additional service between points in the AHE territory, on the one hand, and, on the other, points on the proposed routes.

2. Any movement of traffic between such points would have required Bowman to utilize circuitous routes with resulting waste of fuel and money.

3. Numerous carriers[14] provided service between such points over direct routes.

Footnote Continued—

Bowman's initial brief to the Hearing Examiners (pp. 3-4) and was repeated in Bowman's exceptions brief filed subsequent to its acquisition of the AHE authority (Bowman Exceptions, pp. 5, 7, 8, 80).

13. See, *e.g.*, Bowman initial brief, pp. 10, 17-19, 50, 56, 60, 63, 66, 71, 75; Bowman exceptions, pp. 7-8, 30-31, 80.

14. These included appellees Arkansas-Best, Gordons, T.I.M.E.-DC, Transcon, and Yellow.

4. Such an enlargement of Bowman's application would have required a showing of good cause[15] and republication in the Federal Register, thereby subjecting Bowman's application to additional protests and additional delays.

5. Bowman's operating plan, described in the record, did not include such a proposal, and further evidence would have been required to determine the feasibility of operations over the circuitous routes that would be involved in any joinder of the routes sought with the AHE territory.

However, when the Commission granted the Bowman application, it failed to use appropriate terminology to confine the authority granted to that sought in the Bowman application. Accordingly, the excess authority permitted by the Commission's order would constitute a pure windfall to Bowman.[16] This apparently inadvertent error was immediately brought to the Commission's attention by numerous parties, including several of the appellees.[17] The Commission declined, however, to correct such error.[18]

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15. "Except for good cause shown, amendments to applications which broaden the scope of the proposed operations will not be allowed if tendered after notice of the filing of an application has been published in the FEDERAL REGISTER." I.C.C. Rules, 49 CFR ¶ 1100.247(c)(2).

16. Thereby *permitting* Bowman to perform such service, if and when it deemed it advantageous to do so, but with no *commitment* to do so upon which the public or the Commission could rely.

17. See, *e.g.*, Petition of appellees ET&WNC, Gordons, et al., filed May 22, 1972, p. 159-a; Petition of appellee ABF, filed March 27, 1972, pp. 4-5. The Jurisdictional Statement mentions only the contentions of ABF, ignoring the fact that other parties sought correction of this error as soon as it first appeared.

18. Commission Order dated September 1, 1972 (J.S., App. C).

As previously noted, the Commission's report contained no finding of a public need for operations between the AHE territory and the new territory sought by Bowman. No such finding could have been made since the Commission recognized that *none of the evidence of record dealt with the movement of traffic between such areas.* For example, the Commission described the territorial scope of the application as follows:

> "Generally, the involved traffic moves (1) between points in the Southwest, on the one hand, and, on the other, points in the Southeast, Middle Atlantic, and New England States; (2) between points in the Midwest, on the one hand, and on the other, points in the East and Southeast; and (3) between points in the East and Southeast, on the one hand, and, on the other, points in Mississippi."[19] 114 M.C.C. at 592.

By means of a voluminous appendix to its report, the Commission summarized all of the supporting evidence on a geographical basis. This summary shows that *no witness testified in the proceeding concerning the movement of traffic to or from any point in the AHE territory* (114 M.C.C. at 636-756).

In its ultimate conclusion, the Commission made it clear that its findings of public need for Bowman's service did *not* embrace the AHE territory (Ohio, Indiana and Illinois):

> ". . . We are of the opinion that Bowman has persuasively demonstrated a need for its services between specified points in Mississippi, Kansas, Missouri, Arkansas, Louisiana and Texas, on the one hand, and, on the other, *those points in the Southeast and East that it presently serves.*" 114 M.C.C. at 605 (Emphasis added).

19. The Commission defined the involved area of the "Midwest" as embracing only Kansas and Missouri. 114 M.C.C. at page 592; Note 22, page 595; Appendix F, page 757. A similar geographical analysis appears on pages 599-600 of the report.

The District Court Acted Within the Scope of the Remand.

Bowman suggests (J.S., pp. 4-5) that the issue of tacking the AHE authority was not embraced within the scope of the issues specified by this Court for decision by the District Court on remand. There is no merit to this contention. In its initial decision the District Court described in detail the manner in which the Commission's order granted to Bowman authority that exceeded the scope of the Bowman application. More specifically the District Court indicated clearly its view that the Commission erred in failing to include in its order a provision prohibiting Bowman from tacking the authority granted in this proceeding with the AHE authority. The District Court noted that appellees had properly objected to such Commission action, and expressed its disapproval of the Commission's failure to sustain such objections. 364 F. Supp., at 1255 (See also J.S., App. A, pp. 28-29). On appeal, this Court stated:

> "Various appellees filed objections to the augmented authority sought by Bowman, which the Commission overruled. Appellees challenged the Commission's procedure in the District Court on a variety of grounds, and though the District Court indicated disapproval of the Commission's action, the court did not have to rule on the merits of appellees' objections since it set aside the Commission's approval of all the applications."

This Court then stated that:

> ". . . we believe that the issue of conformity of the Bowman certificate to its application is one for the District Court. The issue was not briefed or argued here, owing to the limitations set forth in our order noting probable jurisdiction. And while the District Court spoke of the Commission's action in this regard, we do not construe its expressions as a final ruling, since they were unnecessary to the District Court's disposition of the case. Accordingly, the issue remains open on remand." (J.S., App. A, p. 25).

The lower court's initial opinion demonstrates that when "the District Court spoke of the Commission's action in this regard," it spoke *primarily* of the Commission's failure to restrict Bowman from tacking the AHE authority with the new authority.

The District Court's opinion clearly considered and disposed of any question concerning the scope of the issue remaining open on remand (J.S., App. A, pp. 27-30).

Response to Bowman's Contentions

Appellees submit that no substantial question has been raised by appellant. However, a brief response to certain arguments appears to be warranted in view of certain unfounded assertions made by Bowman in its Jurisdictional Statement.

Bowman has suggested that appellee Arkansas Best (ABF) relies upon its acquisition of Youngblood Truck Line, Inc. in 1971 as a basis for its opposition to the tacking of the AHE authority. This is not correct. ABF's petition for reconsideration, further hearing, etc., filed pursuant to the Federal Register republication of February 24,

1972, makes clear its interest in the proceeding,[20] and such interest is wholly unrelated to the Youngblood proceeding. In addition, Bowman simply ignores the interest of other appellees, as specified in the petitions they filed with Commission seeking correction of this error.[21] The Youngblood territory is not involved in the issue decided by the District Court.

In its Jurisdictional Statement, appellant discusses the Commission's general policy regarding tacking of operating authorities. Appellees do not quarrel with appellant's statement of Commission policy or with the cases cited in regard thereto.[22] None of those cases involved applications

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20. "The attention of the Commission is also invited to the fact that by virtue of this purchase [Alabama Highway Express], Bowman was authorized to serve points in Indiana, Tennessee, Illinois and Ohio. Said points are depicted on Bowman's map which is attached hereto and marked Exhibit 5 and made a part hereof. For comparison purposes, ABF attaches a copy of its map which is marked Exhibit 6. A comparison of the Bowman map and ABF map will reflect that as a result of the proposed grant of authority in Sub 56, Bowman can handle traffic originating at and destined to the states of Texas, Louisiana, Mississippi, and Arkansas, on the one hand, and parts of Illinois and Ohio and all of Indiana on the other. No evidence was introduced at the time of the hearing to show a need for this authority, and ABF is prejudiced by the grant of this authority in that Bowman's subsequent purchase of the authority of Alabama Highway Express as herein noted did not occur until after the close of evidence in Sub 56."

21. "The Division also erred in failing to impose a restriction that would prohibit Bowman from performing service between the points here sought to be served and the new points acquired by Bowman subsequent to the hearing. As previously noted, Bowman would be authorized to perform service, for example, on traffic moving between Louisiana and Mississippi, on the one hand, and, on the other, Ohio, Indiana and Illinois points. Traffic of this nature was not involved in this proceeding and the Division erred in failing to recognize this fact." (Petition For Reconsideration of appellees ET&WNC and Gordons, May 22, 1972, p. 159-a).

22. The District Court also recognized these principles, both in its initial decision and in its opinion on remand (J.S., App. A, p. 32). In fact, it is because of this general policy that protective terminology must be utilized to conform the Bowman grant to the Bowman application.

similar to Bowman's in which specific and limited tacking proposals were set forth. None involved Federal Register notices specifying such a proposal. The applicable cases are those cited by the District Court. See *Baggett Transportation Co.* v. *United States*, 206 F.Supp. 835 (N.D. Ala. 1962); *Eagle Motor Lines, Inc.* v. *United States*, 331 F.Supp. 80 (N.D. Ala. 1971); *Georgia-Florida-Alabama Transportation Company* v. *United States*, 290 F.Supp. 764 (M.D. Ala. 1968); *May Trucking Company* v. *United States*, 290 F. Supp. 38 (D. Idaho 1968); and *Curtis, Inc.* v. *United States*, ... F.Supp. ..... (D. Colo. July 21, 1975) (J.S., App. A, pp. 37-44). In each of these cases the court recognized that the Commission and interested parties must be able to rely upon representations embodied in applications before the Commission in order to protect the integrity of the administrative process and to avoid denial of due process. Clearly, the District Court was correct in finding that it was Bowman which defined the limitations and restrictions on the authority which it sought, and that it would constitute a denial of due process to enlarge the scope of such authority in the absence of (a) any evidence in support of such an enlargement and (b) any finding of public need therefor.

Bowman's examples of recent grants of authority to other carriers (J.S., pp. 10-11) are not appropriate to the matters involved in this proceeding because those carriers did not seek the limited type of authority described by Bowman in its application.

Bowman discusses (J.S., p. 10) a hypothetical movement of traffic between Akron, Ohio and Dallas, Texas. It is important to realize that this is a hypothetical example, and that no evidence was offered by Bowman or any other carrier as to a need for service between such areas. In stating its hypothesis, Bowman failed to explain that

shipments between such points would normally move over direct routes utilized by appellees and others that operate between such cities. Further, Bowman's suggestion of unnecessary duplication of operating rights is contrary to the scope of its own application. For example, Bowman sought authority over a route between Dallas, Texas and Birmingham, Alabama via Jackson, Mississippi. However, Bowman limited its proposal by stating that it would not handle traffic moving between Dallas and Jackson. In other words, under the Commission's grant, Bowman can pick up traffic in Dallas and carry such traffic through Jackson, but it cannot deliver such freight at Jackson. This is not unusual in the motor carrier industry, and Bowman's argument involving duplication is without merit in fact or in theory.

Finally, Bowman suggests that the District Court imposed its restriction in an area greater than that sought by appellees, in that appellees did not seek to impose the no-tacking restriction as to the states of Tennessee and Florida. The lower court's decision was correct in this regard. The no-tacking provision will not affect Bowman operations in Tennessee and Florida because Bowman's *existing* authority (described in its application and the Federal Register notice) included the right to serve all points in Tennessee and in Florida.

CONCLUSION

The District Court found:

"We can find no way in which judicial approval can be given to the Commission's grant of the excess tacking authority. The requisites for a lawful grant of authority greater than that proposed in the applica-

tion are (1) a finding supported by substantial evidence of a public need therefor; (2) republication of the enlarged grant so as to afford interested parties adequate notice thereof; and (3) consideration of objections thereto following republication. The absence of the establishment of each of the requisites results in depriving the person or corporation of due process." (J.S., App. A, p. 37).

In the court below all parties agreed that the above statements constitute a correct summary of the principles applicable to the issue on remand. Indeed, in its brief on remand, the government frankly acknowledged that "[h]ad Bowman affirmatively indicated that it *did not intend* to tack these rights with any others to be subsequently obtained, plaintiffs' [appellees'] contentions would be appropriate." (Government Brief, p. 20). The Court concluded that this intention *was* clearly expressed in the Bowman application and in the Federal Register notice thereof.[23]

Bowman does not take issue with the correctness of the court's statement of the governing principles applicable to this proceeding. In like manner Bowman does not take issue with the court's finding that Bowman's intention was clearly stated in its application and in the Federal Register notice thereof. In effect, Bowman simply takes the position that there are *no* conditions or situations under which a court can properly hold invalid any portion of an order of the ICC in a proceeding that involves an issue of public convenience and necessity.

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23. "There is nothing ambiguous in the application or in the notice describing the proposal." (J.S., App. A. p. 36). "The published language constitutes a specific limitation regarding tacking which did not give notice to the public of any intention to tack the authority sought in the present proceeding to authority subsequently acquired." (J.S., App. A, pp. 32-33).

The scope of the District Court's decision is summarized in its "Conclusions" (J.S., App. A, p. 44):

(1) "The Supreme Court in its opinion of December 23, 1974, granted to Bowman all operating authority embraced within the scope of its application as filed and presented to the Commission."

(2) "By our decision today we hold that Bowman should be granted only the excess authority for which the Commission found from legal and competent evidence a public need existed."

(3) "We set aside as invalid only that portion of the Commission's order that granted Bowman excess authority that was and is not supported by any evidence of public need and in regard to which there was no finding of any public need."

Approval of the grant of the excess authority discussed in (3) above would have done violence to the statutory requisites for the issuance of operating authority,[24] and would have been an abdication of the reviewing court's responsibilities inherent in the mandate of this Court and in the provisions of the Administrative Procedure Act, 5 U.S.C. §706.

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24. ". . . a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations *covered by the application*, if it is found that the applicant is fit, willing, and able properly to perform *the service proposed* . . . and that the *proposed service*, to the extent to be authorized by the certificate, *is or will be required by the present or future public convenience and necessity;* otherwise such application *shall be denied.*" 49 U.S.C. §307(a) (emphasis added). The only portion set aside by the court was that not "covered by the application," for which there was no "service proposed," and for which there was no finding that it "is or will be required by the present or future public convenience and necessity."

There is no substantial question presented by this appeal. The judgment of the District Court should be affirmed.

Respectfully submitted,

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